IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

JOSEPH W. DI SILVESTRO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioner, Joseph W. Di Silvestro, Appellant below, prays, that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on June 15, 1960, at (A-16) and the judgment of the said Court dated June 10, 1960, to wit:

> "MOTION FOR LEAVE TO DISPENSE WITH PRINTING OF BRIEF AND APPENDIX; MOTION FOR PREFERENCE FOR AN EARLY HEARING OF THE APPEAL.
>
> Motion denied.
>
> The order is affirmed on the opinion of Judge Rayfiel.
>
> J. E. LUMBARD
> C. E. CLARK
> H. J. FRIENDLY
> U. S. C. JJ."

Opinion Below

The United States Court of Appeals for the Second Circuit affirmed the order on opinion of Judge Rayfiel at (A-12), has not yet been printed in the Federal Reporter.

Jurisdiction

The final judgment of the United States Court of Appeals for the Second Circuit was entered on June 15, 1960. This petition for certiorari is filed within ninety days thereafter in accordance with the provisions of Title 28 U. S. C. 2101(c).

Questions Involved

1. Whether the petitioner, an honorably discharged war veteran, having a war service-connected disability, rights to medical and hospital care and treatment under Executive Order No. 6566, Veterans' Regulation No. 6, have been violated?
2. Whether petitioner's guarantees to the due process of law under the First and Fifth Amendments of the Constitution of the United States have been violated by judgment of the lower federal courts, precluding judicial review and the right to maintain an action under the Federal Tort Claims Act, for the negligent treatment of petitioner's war service-connected disability?

Statutes Involved

The President of the United States said:

"NOW THEREFORE, by virtue of authority vested in me by . . . law the following regulation is promulgated:

"I. The . . . Veterans' Administration . . . is authorized to furnish to honorably discharged war veterans of any war . . . domiciliary or hospital care, including medical treatment, *to the following persons in the specified order of preference:*

(a) to veterans who are suffering with injuries or diseases which were incurred or aggravated in line of duty in the Military or Naval service *when in need of hospital treatment for such injuries or diseases.*" *Executive Order No. 6566, Veterans' Regulation No. 6,* section 6 Public Law 2, 73d Congress (706 U. S. C. A. 38). (Italics added.)

* * * *

Section 1346(b) Title 28 U. S. C. (Federal Tort Claims Act) provides in the relevant part, to wit:

"the United States District Court wherein the plaintiff is a resident . . . sitting without a jury . . . shall have exclusive jurisdiction to hear, determine, *and render judgment on any claim against the United States for money* . . . on account of damage to or loss of property or on account of *personal injury* . . . caused by the negligence or wrongful act or omission of any employee of the Government while acting

within the scope of his office or employment, under circumstances, where the United States, if a private person would be liable to the claimant for such damage, loss, injury . . . in accordance with the law where the act or omission occurred." (Italics added.) (New Title 38, U. S. C. A., effective 1960, is not applicable in the case at bar.)

Statement of the Case

On September 30, 1959, the Honorable United States District Judge Matthew Abruzzo, by evidence adduced by the court in 1948, found the petitioner to have an already adjudicated award of compensation (A-3). Under this award the petitioner was included in the class of disabled war veterans in the "Specified Order of Preference Under Class '(a)' of Executive Order No. 6566, Veterans Regulation No. 6," that created a right to the petitioner to be furnished with *medical, domiciliary* and *hospital* care and treatment by the Veterans Administration, *for the protection of petitioner's war disability.* Under these circumstances, Judge Abruzzo placed the petitioner on September 30, 1959 in the custody of the Court and directed the petitioner to enter a VA hospital for treatment and care. See filed transcript of record page 37 of Proceedings in the United States Court of Appeals. Under the supervision of the said court the sick and ailing petitioner applied for hospital admission and was denied medical aid and hospitalization by a forfeiture order of the Board of Veterans Appeals at (A-5), that was retroactively applied against an already adjudicated award to such disability rights. Thereafter the petitioner resorted

to Doctor Harry G. Golan for medical treatment. Doctor Harry G. Golan found the petitioner's war disability greatly exacerbated and prescribed "nitroglycerine pills" to lessen petitioner's mental and physical pains (A-6). As a result of the said Board's action the VA and its officials have failed to protect the petitioner from *the type of harm which in fact occurred* (A-3, A-4, A-5, A-6, A-7, A-8 to A-11).

Now in the case at bar, Judge Rayfiel of the District Court has precluded judicial review and has precluded to maintain judicial jurisdiction to review the acts of the public officials of the Veterans Administration, who have retroactively applied a fraud statute, under *Section 15, Public Law 2, 73d Congress,* forfeiting petitioner's rights that have already been adjudicated to the benefits under *Executive Order No. 6566,* that requires the VA to furnish the petitioner with medical and hospital care and treatment for his war service-connected disability. The United States Court of Appeals for the Second Circuit affirmed the opinion of Judge Rayfiel at (A-12 to A-15).

The petitioner asserts that the lower courts erred and failed to hold that the violation of petitioner's rights to medical and hospital treatment and care under Executive Order No. 6566, Veterans Regulation No. 6, is *negligence per se.*

The petitioner asserts the wrongful acts and omissions of the Administrator's Board of Veterans' Appeals, as public officials, had no authority to forfeit petitioner's already adjudicated rights, and that such wrongful acts and omissions of said Board of Veterans' Appeals are a wilful violation of federal law, regulations and executive orders.

The petitioner further asserts that the negligent treatment of his service-connected disability, by refusal of the VA to hospitalize petitioner on September 30, 1960, sustains his cause of action under his complaint filed in the lower court's record at pages 1 to 7, and sustains his right to sue the United States under Section 1346(b) of Title 28, U. S. Code, for damages for personal injuries, and sustains his guarantees to judicial review and redress of his grievances in the District Court.

• Specifications of Errors to Be Urged

That the petitioner will urge that the lower courts erred in opinion that concluded Judicial Review and foreclosed a trial of the issues on the merits of the complaint and the answer. That the lower courts erred in upholding a summary judgment to deny judicial review of the pleadings, *without a hearing* or *determination* of Respondent's unverified *answer*, that denied irrefutable *evidence* in support of the *complaint*, arising out of causes of action for negligence, wrongful acts and omissions in violation of *Executive Order No. 6566*. That the lower courts erred contrary to law and fact, in opinion, concluding without a judicial review that petitioner *seeks "pension" disability benefits*. That the lower courts have erred and failed to decide that petitioner's benefits flow from *compensation disability* for a war *service-connected disability*, within the purview of *the preference class "(a)"* of *Executive Order No. 6566*, that placed and includes the petitioner under the protection of *medical* and *hospital* care and treatment, inviolate. That *pension* disability benefits are not included *with*

service-connected disability and that the opinions of the courts below are baseless and that the Circuit Court below, in affirming preclusion of judicial review, is in violation of petitioner's right to maintain an action under the Federal Tort Claims Act for the negligent treatment of petitioner's war service-connected disability.

Reasons for Granting the Writ

The petitioner asserts that a writ of certiorari should be granted under subdivision (b) of Part V of Rule 19 of this Court, in that the District Court and the United States Court of Appeals for the Second Circuit have rendered a decision in conflict with the Constitution of the United States and with the decisions of the United States Court of Appeals for the District of Columbia, and in conflict with applicable decisions of this Court, and that the lower courts have so far departed from the accepted judicial proceedings as to call for an exercise of the Court's power of supervision.

This case, while it involves petitioner's individual and constitutional rights and guarantees, is very important because here Congress has created a statutory duty imposed by law holding RESPONSIBLE any federal agency or employee of the Government to a minimum requirement of the exercise of "Due Care", to wit:

> "The exercise of due care is 'required' upon any statute or regulation *whether or not such statute or regulation be valid or invalid*, or based upon the exercise or perform a discretionary function or duty on the part of a federal agency or an

employee of the Government, whether or not the discretion involved is abused." *Section 2680(a) of Title 28 U. S. Code* (Federal Tort Claims Act).

To hold any federal agency or Government employees immune from judicial review of their negligence or unanswerable for the wrongful acts and omissions particularly in the case at bar for the negligent treatment of petitioner's war service-connected disability then we have created an autocracy, then the Constitution of the United States, Acts of Congress of the United States and Executive Orders of the President of the United States created to protect disabled war veterans from the type of harm which in fact has occurred in the case at bar *are entirely worthless.*

It is well established that "violations of statutes constitute *negligence per se.*" See: *Mitchel, J.*, in *Osborne* v. *McMasters*, 1899, 40 Minn. 103, 105, 41 N. W. 543, 544, 12 Am. St. Rep. 698.

"Where a ministerial duty obviously imposed for the benefit of a particular class of persons, one within that class may found an action on the statute." *Howley* v. *Scott*, § 913, 123 Minn. 159, 145 N. W. 257, 51 L. R. A., N. S. 137.

"The same limitation of the effect of the statute to accomplish only the supposed policy of the legislature is found in the requirement of the harm suffered must be of the kind which the statute intended, in general to prevent." See: *Thayer, Public Wrong and Private Action*, 1914, 27 Harv. L. Rev. 317, 325.

Judge Cardozo held:

> "Where the statute is interpreted as intended to protect the class of persons in which the plaintiff is included, against the risk of the type of harm which has in fact occurred, *the weight of authority holds that an unexcused violation is negligence in itself* and the court must so charge the jury." *Cardozo, J.*, in *Martin* v. *Herzog*, 1920, 228 N. Y. 164 N. E. 814; *Larkins* v. *Kohlmeyer*, 1951, 229 Ind. 391, 98 N. E. 896; *Schell* v. *DuBois*, 1916, 94 Ohio St. 93, 113 N. W. 664 L. R. A. 1917A, 710; *Anais* v. *Britton*, 232 Mich. 241, 205 N. W. 128.

The courts below entirely ignored petitioner's right to sue for "negligence" under Section 1346(b) U. S. C. 28. Here the lower courts entirely ignored the ruling of Judge Cardozo, that must be equally applicable to district courts when sitting without a jury. Here the lower courts entirely ignored the Board of Veterans' Appeals' unexcused violation of petitioner's rights under the law of *Executive Order No. 6566, Veterans Regulation No. 6.* Here, the courts below erred in basing their opinions upon a conclusion that petitioner is seeking "to obtain a review of the decision of the Veterans' Administration which forfeited his *pension* and disability benefits" at (A-12). The petitioner is not asking for any such review. The petitioner is simply suing for damages of *forfeiture action* of the Board of Veterans' Appeals' negligence and unexcused violation of the petitioner's *compensation disability benefits* that have been already adjudicated and awarded to him, not in a *pension* classification which is defined as *non-service-connected disability*—but for a *service-connected disability* de-

fined as "Compensation Disability" by Section 700 U. S. C. A. 38, and within the purview of Executive Order No. 6566, Veterans' Regulation No. 6, to wit:

> "I. The Veterans Administration is authorized to furnish to honorably discharged veterans of any war . . . domiciliary, or hospital care, including medical treatment, *to the following persons in the specified order of preference:*
>
> (a) to veterans who are suffering with injuries incurred or aggravated in line of duty in the Military or Naval service" (A-3, A-4). (Italics added.)

The above is a property right vested in the petitioner and forfeited by the Board of Veterans' Appeals at (A-5) in violation of the due process of law and violative of petitioner's guarantee to petition the Government for redress of his grievances. Executive Order No. 6566 must be held mandatory and binding upon the Veterans' Administration's Board of Veterans' Appeals as public officials and employees of the United States Government to preserve inviolate petitioner's guarantees under the First and Fifth Amendments of the Constitution of the United States.

Now, the attorneys for the Respondent in the courts below worked out an ingenious scheme to circumvent a default judgment and a sham answer that denied the evidence appended hereto at (A-1 to A-11) in support of petitioner's complaint, filed in Transcript of Record pages 1 to 7.

That on January 20, 1960 at a hearing before the Honorable Judge Mortimer Byers of the District Court for a default judgment against the Respondent,

Judge Byers precluded and denied the Government's defense invoked at said hearing under Section 705 U. S. C. A. 38. The Court held the Respondent *answerable* for the charges of the violation of petitioner's rights that were forfeited by the Board of Veterans' Appeals. (Heretofore, under a different cause of action, Judge Byers precluded judicial review under Section 705, in *Di Silvestro* v. *United States Veterans Administration*, 151 F. Supp. 337, certiorari denied 355 U. S. 935.) Judge Byers referred the petitioner's motion for default judgment to the Honorable Judge John R. Bartels, who on February 15, 1960, decided, to wit:

> "Motion by plaintiff for default judgment. Heretofore a motion was made ex parte, for an extension of time to answer, and answer only. However, no order having been submitted on the motion the Court itself, in its own handwriting, wrote out an order adding the words 'or move' without any intention of enlarging the relief requested. Plaintiff then moved to reduce the time granted from 60 to 30 days. This motion was granted, the Court thereupon conforming the order to the defendant's motion papers by deleting the words 'or move'. After lapse of thirty days extension, *defendant nevertheless has refused to answer* but instead has moved against the complaint within the said 30 days in spite of the order. Plaintiff's motion is hereby granted unless defendant files and serves its answer within 20 days hereof, in which event it is denied. This is an order"
>
> /s JOHN R. BARTELS
> U. S. D. J.

(certified record, pages 63-64). (Italics added.)

After the answer was filed and served, Judg. Rayfiel refused to review the joinder of issues and refused to review the truthfulness of an unverified answer, and precluded judicial review of all pleas submitted by the petitioner. Judge Rayfiel further without judicial review of the pleadings rendered his opinion solely upon a prejudicial review of the complaint, *without trial of the issues.* It is asserted that such action of the lower court is in direct violation of the due process of law guaranteed to the petitioner under the Fifth Amendment. It must hold that the lower courts erred and failed to uphold petitioner's rights to the "equal protection under the law."

Further, the opinion concluded at (A-14, 2nd paragraph), to wit:

> "the correspondence attached to the moving papers . . . appears . . . plaintiff is charging the administration with libel . . . section 2680(h) of Title 28 U. S. Code *excepts* a claim arising out of libel."

Here, again, the lower court without judicial review of the answer concludes solely upon correspondence attached to the affidavit of the moving papers submitted in behalf of the Respondent by its attorneys as a devious and ingenious scheme to deprive petitioner of a default judgment and to circumvent a *sham answer* and the trial of the pleadings. In support thereof, the lower courts erred in opinion, because it lacks a trial of the exception of libel, viz:

> "A hearing on an exception of libel must be determined on the pleadings and *an affidavit on*

behalf of the respondents cannot be considered." *Prince Steamship Co.* v. *Lehman*, D. C. N. Y., 1899, 39 F. 704, 5 L. R. A. 464. (Italics added.)

Moreover, petitioner is not charging the administration with libel, *but with the negligent treatment of his war service-connected disability in violation of his rights under Executive Order No. 6566.*

The lower courts in opinion relied upon the following cases to preclude judicial review under Section 705 U. S. C. A. 38, viz:

Di Silvestro v. *U. S. Veterans Administration*, 132 F. Supp. 692, aff. 228 F. 2d 516, cert. denied 350 U. S. 1009;

Di Silvestro v. *U. S. Veterans Administration*, 151 F. Supp. 337, cert. denied 355 U. S. 935 (1959). (In this latter case, Judge Byers precluded judicial review.)

Now, in the case at bar, both Judge Byers and Judge Bartels held the Respondent answerable for its acts and omissions. *Here, in the case at bar, Judge Byers precluded the Respondent from invoking Section 705 to bar jurisdiction and judicial review.* The opinion of the lower courts are in conflict with the action now taken by Judge Byers. It must hold that the lower courts' opinion is not based on fact or law because it avoids judicial review of the pleadings. *There can be no determination of the law without first a determination of the facts.* This the lower courts have erred and failed to do which is commanded under the due process and equal protection of the law!

The evidence of record in the lower court at pages 53 and 108 proves conclusively that the officers, including the officers of the Board of Veterans' Appeals acting for the Administrator of Veterans' Affairs, in violation of regulations and law, *retroactively applied a fraud statute under Section 15, Public Law 2, 73d Congress*, forfeiting petitioner's rights retroactively, viz:

> "VA Regulation 2907(A) . . . Board of Veterans Appeals . . ."
>
> "VA Regulation 2907(B) In view of the drastic nature of the provisions for forfeiture prescribed by . . . Section 15, Public Law 2, 73d Congress . . . it is the duty of the officials designated in VA Regulation 2907(A) . . . Board of Veterans Appeals . . . in connection with the foregoing . . . statutes relating to fraud are without retroactive application" (filed in the Transcript of Record page 81; also see A-18).
>
> "The Board of Veterans' Appeals shall in its decisions be bound by the regulations of the Veterans' Administration, instructions of the Administrator of Veterans' Affairs." Executive Order No. 6230, Veterans Regulation No. 2(a), Part II, Subdivision II, Public Law 2, 73d Congress, Section 9 (709 U. S. C. A. 38); 38 U. S. C. ch. 12, Veterans Regulation.
>
> "Regulations prescribed by the Administrator of Veterans' Affairs which are authorized by statute have the force and effect of law." *Brown v. United States*, 102 F. Supp. 132 (S. D. 799 aff. Fed. 2d 263).

> "The determination of fraud upon which the Administrator of Veterans' Affairs *acts retroactively* in case of fraud . . . is not a conclusive nature. Facts found by the Administrator does not carry with it the conclusiveness of taking it away retroactively." *Hines* v. *United States ex rel. Marsh*, 1939, 105 F. 2d App. D. C.; World War Veterans Act 1924, Section 5,504, as amended, 38 U. S. C. A. Sections 426, 555, which corresponds with . . . *Section 15, Public Law 2, 73d Congress* (715 U. S. C. A. 38). (Italics added.)

No, it cannot hold that Section 705 is an open door sesame to preclude judicial review or deny the petitioner the right to maintain an action for the negligent treatment of his war service-connected disability.

The petitioner contends that the opinion of the lower courts is contrary to law and fact and the lower courts' decisions are in conflict with the decisions of the United States Court of Appeals for the District of Columbia and with decisions of this Court. The petitioner predicates upon the foregoing and the following authorities and law, in support of his petition for a writ of certiorari, that fall squarely in point with the case at bar, to wit:

> "Under any act administered by the Veterans' Administration . . . did not preclude judicial review by the Administrator working forfeiture of an already adjudicated award of benefits." *Wellman* v. *Whittier*, C. A. D. C. 1958, 259 F. 123.

In the *Wellman* case mentioned above, the Court of Appeals for the District of Columbia, with more

than twenty years of actual adjudication of veterans' cases, rendered a ruling which is directly in point with the petitioner's case at bar.. It was decided in the *Wellman* case, to wit:

> "While statutes pertaining to forfeiture of Veterans' benefits authorizes a determination, by the Administrator upon evidence satisfactory to him, and if it depends upon erroneous interpretation of the law, it may be subject to judicial review . . . He may not deny a right the statute created. See: Dismuke v. United States, 1936, 297 U. S. 167, 172, 56 S. Ct. 400, 90 L. Ed. 561 . . .
>
> the Administrator argued the preclusion of judicial review; which has been the argument of the defendant in the case at bar to preclude judicial review under section 705; it was argued by the Administrator that if '38 U. S. C. A. section 705 does not apply here he may stand upon 38 U. S. C. A. 11a-2, which reads:
>
> 'Notwithstanding any other provisions of law of this . . . title the decisions of the Administrator of Veterans Affairs on any question of law and fact concerning a *claim* for benefits or payments under any act administered by the Veterans' Administration shall be final and conclusive . . . (underscoring supplied) . . . it be noted Congress accorded finality to decision properly completed and executed VA Form 8-526 * * * constitutes benefits *concerning claims*, a term which is thoroughly understood and carefully defined.'
>
> We have repeatedly recognized that non-reviewability must be accorded to the Administrator's

decisions as to claims. See: Longernecker v. Higley, 1955, 97 U. S. D. C. 144, 229 F. 2d 27 and see Jaffe, The Right to Judicial Review II, 71 Harv. L. Rev. 770 (1958) . . .

But here we are not concerned with a 'claim' by a veteran, but with action by the Administrator working a forfeiture of an already adjudicated award to benefits." *Wellman* v. *Whittier*, C. A. D. C. 1958, 259 F. 2d 123, petition for rehearing denied September 12, 1958. (Italics added.)

Judge Rayfiel and the Court of Appeals for the Second Circuit entirely ignored the precedent established in *Wellman* v. *Whittier*, supra.

The courts below entirely ignored petitioner's evidence appended hereto at (A-1 to A-11) and completely ignored that petitioner has an already adjudicated award to all benefits, properly completed upon an executed VA Form 8-526 in custody of the Veterans' Administration, under C = 4 780 118, bearing the petitioner's name.

The actions taken by the lower courts is in clear violation of the petitioner's rights. And that the Respondent's employees under the supervision of a different Administrator of Veterans' Affairs has taken away a right created under Executive Order No. 6566, awarding petitioner medical and hospital care and treatment, which "he may not deny a right the statute created." *Dismuke* v. *United States*, 297 U. S. 167, 56 S. Ct. 400, 90 L. Ed. 581, supra in brief.

The petitioner is seeking redress for his grievances and for the right to maintain an action against the

United States, under the Federal Tort Claims Act created under Section 1346(b) thereof, for the negligent treatment of his war service-connected disability, in accordance with the ruling of this Court, that was completely ignored by the lower courts, to wit:

> "A veteran might maintain an action against the United States for an injury suffered . . . as result of negligent treatment of a service-connected disability." *United States* v. *Brown*, 348 U. S. 111, 75 S. Ct. 141 (1954).

For the foregoing reasons the petition for a writ of certiorari should be granted.

WHEREFORE, the petitioner prays that a writ of certiorari may issue under the seal of this Honorable Court in this cause, directed to the United States Court of Appeals for the Second Circuit, that upon such review that the decision and judgment of that court be vacated and set aside, and this cause remanded to the said Court of Appeals in accordance with the views of this Court.

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